United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 16, 2007

TO : Gary W. Muffley, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Meridian Automotive Systems
Case 9-CA-42952

512-5036-6745
512-5036-8325
530-6001-5033-2500
530-6067-2030-1200
530-6067-2060-1800
530-6067-2060-9400

This case was submitted for advice as to whether the Employer's lockout violated Sections 8(a)(1) and (3) because the Employer instituted the lockout after it had withdrawn its final offer, and then continued the lockout for three months before finally presenting a regressive proposal to the Union.

We conclude that the Employer's lockout was lawful because (1) it was in support of a good faith bargaining position because the Employer's withdrawal of its final proposal and presentation of a regressive proposal three months later did not, standing alone, constitute bad faith bargaining, and the Employer otherwise bargained in good faith; (2) the Employer adequately informed employees how they could end the lockout because it informed the Union that the lockout would continue until the parties reached agreement; and (3) there is no evidence that the lockout otherwise was discriminatorily motivated.

FACTS

After several months of bargaining, on April 20, 2006, the day prior to the expiration of the parties' contract, the Employer provided the Union with what it termed as its final offer. The following day, the Employer e-mailed the Union that the Employer would withdraw its final offer upon the occurrence of either of the following: Sunday April 23, at 6 p.m., or an earlier work stoppage. On April 23, after the deadline had been extended and finally expired, the Employer e-mailed the Union to express concern about the parties' not having reached an agreement. The Employer's e-mail also announced that the Employer would continue operations without unit employees until an agreement was reached.

After the Employer withdrew its final offer, it sent several letters to the Union stating its desire to resume negotiations. When the Union finally agree to resume negotiations three months later, the Employer declined to make another offer and asked that the Union make an offer. In subsequent negotitations, the Employer reviewed and seriously considered the Union's proposals before it rejected them.

ACTION

An employer does not violate the Act by temporarily locking out employees for legitimate and substantial business reasons,[1] including an attempt to pressure employees to accept legitimate bargaining proposals.[2] An employer does violate Section 8(a)(3) if its lockout is in support of an illegitimate, bad faith bargaining position[3], or the employer fails to inform employees how they can end the lockout,[4] or the lockout is otherwise discriminatorily motivated.[5]

We first conclude that the lockout was instituted in support of a good faith bargaining position. The Board determines bad faith bargaining by examining the totality of circumstances rather than one particular moment during bargaining.[6] Here, the Employer clearly did not engage in

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[1] Harter Equipment, 280 NLRB 597 (1986), petition for review denied, 829 F.2d 458 (3rd Cir. 1987).

[2] Central Illinois Public Service Co., 326 NLRB 928, 932 (1998); American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965).

[3] See e.g., D.C. Liquor Wholesalers, 292 NLRB 1234, 1237 (1989); Horsehead Resource Development Co., 321 NLRB 1404, 1404 (1996); Allen Storage & Moving Co., 342 NLRB 501 (2004), citing Teamsters Local 639 v. NLRB, 924 F.2d 1078 (D.C. Cir. 1991)(lockout in support of unlawfully implemented final offer violated Sec. 8(a)(3)).

[4] Eads Transfer, 304 NLRB 711, 712 (1991), enfd. 989 F.2d 373 (9th Cir. 1993); Dayton Newspapers, 339 NLRB 650, 653-54 (2003), affd. in part 402 F.3d 651 (6th Cir. 2005).

[5] See, e.g., O'Daniel Oldsmobile, Inc., 179 NLRB 398, 402 (1969); McGwier Co., 204 NLRB 492, 496 (1973).

[6] Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984; Overnight Transportation Co., 296 NLRB 669, 671 (1989), enfd 938 F.2d 815 (7th Cir. 1991).

any bad faith bargaining prior to the lockout.[7] The Employer's withdrawal of its final proposal after the lockout, and its presentation of a regressive proposal three months later, also did not amount to bad faith bargaining.

An employer does not engage in bad faith bargaining simply by withdrawing its current bargaining proposal without presenting a replacement.[8] Indeed, even the ultimate substitution of a regressive offer does not constitute bad faith bargaining.[9]

The Employer here withdrew its final proposal and presented a regressive proposal three months later. The Employer was justified in withdrawing its April 20 final offer upon expiration of the April 23 deadline because the Union had summarily rejected it by not responding. The Employer was also justified in not immediately making another offer because the Union had never made any counteroffer of its own after rejecting the Employer's final offer. There is no evidence that the Employer otherwise bargained in bad faith during this time period or thereafter.[10] In sum, viewing the totality of circumstances here, we conclude that the Employer did not bargain in bad faith.

The Employer also notified the Union and its employees that it was locking them out until a new agreement was reached. Thus, the Employer adequately informed the Union

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[7] Negotiations began in February and the parties presented their economic proposals in March. By April, both parties had made substantial movement on several issues including wages. The Region thus determined that the Employer had been negotiating in good faith leading up to its lockout.

[8] Hyatt Regency New Orleans, 281 NLRB 279, 283 (1986); see also Dilene Answering Service, Inc., 257 NLRB 284, 292 (1981) (failure to make any new proposals for three months not bad faith bargaining).

[9] Id (regressive offer, presented 4 ½ months after prior offer withdrawn, legitimate, where support for the union was waning, and the union was anxious to sign an agreement at the earliest possible moment).

[10] Although the Employer did provide a regressive offer three months after withdrawing its final proposal, in subsequent negotiations the Employer made concessions to that regressive offer.

and the employees of the conditions needed to end the lockout.[11] Finally, there is no evidence that this lockout otherwise was discriminatorily motivated. We therefore conclude that the lockout was lawful.

We also conclude that this case is distinguishable from Milwaukee Dustless Brush Co.[12] There, an employer was found to have unlawfully denied reinstatement to economic strikers because its lockout, initiated in response to the offer to return, was unaccompanied by any statement of the employer's contract demands which employees could have accepted to end the lockout. The employer had withdrawn its prior final offer some three months previously, in the midst of the strike, citing its declining financial condition and promising to provide a new proposal "as soon as possible."[13] Because the employer had still not presented a revised proposal when the union unconditionally offered to return, yet it announced a lockout until an agreement was reached, the ALJ concluded that the employer failed to fulfill its duty to clearly inform the employees of the conditions they had to meet to be reinstated.[14] In addition, the lockout was found to have been discriminatorily motivated.[15] Among the factors cited in support of this finding was the employer's failure to to present a bargaining proposal for three months. The ALJ noted that the employer's bargaining position (which the lockout ostensibly supported) was "unspecified and undefined" for the three months preceding the lockout and the lockout was imposed immediately upon receiving the offer to return. The employer did not present a proposal until two weeks later; yet, the ALJ concluded, there was nothing in the content of the proposal which could not have been presented three months earlier. These circumstances demonstrate, the ALJ concluded, the employer "was less interested in getting the Union to accept its bargaining

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[11] Anchor Concepts, 323 NLRB 742, 744 (1997), enf. denied 166 F.3d 55 (2nd Cir. 1999)("Respondent's assertion that it would not offer the strikers reinstatement until a new agreement was reached was sufficient to inform the striking employees that the employer was locking them out in support of its bargaining demands.")

[12] JD-18-04 (December 10, 2004), adopted by Board upon withdrawal of exceptions (March 17, 2006).

[13] Id., slip op. at 5

[14] Id., slip op. at 10-11.

[15] Id., slip op. at 12-15.

position than in undermining the Union, punishing union members for striking, and depriving them of their lawful reinstatement rights."[16]

Here, unlike in Milwaukee Dustless Brush Co., there is no evidence that this lockout is discriminatorily motivated. The Employer's failure to offer a substitute for the withdrawn proposal here was not designed to punish the employees for striking but rather was a bargaining tactic to give the Union an incentive to move bargaining along by making its own proposal. Consistent with that approach, the Employer announced that the lockout would end when an agreement was reached, adequately informing employees of how they could end the lockout.

We therefore conclude that the Region should dismiss these charges, absent withdrawal.

B.J.K.

[16] Id., slip op. at 15.